Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1996

FELIPE RUIZ,

*Petitioner,*

v.

BLENTECH CORPORATION, a California Corporation,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the principle of dépeçage, which is now widely used throughout the federal system, in order to be properly applied, requires that the relevant issue be decided consistently with the law of the state which has been recognized to have the greatest interest therein?

## LIST OF PARTIES

The following is a complete list of all parties involved in this litigation:

A. **Petitioner** herein and Plaintiff below: FELIPE RUIZ.

B. **Respondent** herein and one of the Defendants below: BLENTECH CORPORATION, a California Corporation, the shares of which are not publicly traded.

C. **Other Defendants and Cross-claimants** below, whose cases have been otherwise disposed of: WEILER & CO., INC., a corporation; DAN SCHWERDTFEGER; WEILER EAST, INC., a corporation; ZURICH AMERICAN INSURANCE COMPANY; J & S PROVISION, INC., a corporation; OMICRON FROZEN FOODS, INC., a corporation, and CUSTOM STAINLESS EQUIPMENT CO., INC., a California corporation, the assets of which were purchased by BLENTECH.

TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| List of Parties | ii |
| Table of Contents | iii |
| Table of Authorities | iv |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statement of the Case | 2 |
| The Underlying Claim | 2 |
| Procedural History | 2 |
| Reasons for Granting the Petition | 8 |
| Conclusion | 18 |

## TABLE OF AUTHORITIES

Page

CASES:

*Barton v. Drummond Co.*, 636 F.2d 978 (5th Cir. 1981) ..... 14

*Beard v. J.I. Case Co.*, 823 F.2d 1095 (7th Cir. 1987) .... 14

*Broome v. Antlers' Hunting Club*, 595 F.2d 921 (3rd Cir. 1979) ..... 14

*Crellin Technologies v. Equipmentlease Corp.*, 18 F.3d 1 (1st Cir. 1994) ..... 14

*Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786 (2nd Cir. 1980) ..... 12

*Ewing v. St. Louis-Clayton Orthopedic Group, Inc.*, 790 F.2d 682 (8th Cir. 1986) ..... 14

*Foster v. United States*, 768 F.2d 1278 (11th Cir. 1985) ..... 14

*Hunter v. Greene*, 734 F.2d 896 (2nd Cir. 1984) .. 12, 13, 14

*In Re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594 (7th Cir. 1981) ..... 12

*In Re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987) .... 14

*In Re Korean Airlines Disaster*, 932 F.2d 1475 (D.C. Cir., 1991) .....12, 14

*Internat'l Administrators, Inc. v. Life Insurance Co. of North America*, 753 F.2d 1373 (7th Cir. 1985) ..... 14

*Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992) ..... 14

TABLE OF AUTHORITIES – Continued

Page

*La Plante v. American Honda Motor Co.*, 27 F.3d 731 (1st Cir. 1994) ..... 14

*Putnam Resources v. Pateman*, 958 F.2d 448 (1st Cir. 1992) ..... 14

*Ray v. Alad Corporation*, 19 Cal.3d 22, 560 P.2d 3, 136 Cal.Rptr. 574 (1977) ..... 15

*Renyo v. Piper Aircraft*, 630 F.2d 149 (3rd Cir. 1980) .... 12

STATUTES:

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 2101(c) ..... 1

ARTICLES:

Reese, *Dépeçage: A Common Phenomenon In Choice of Law*, 73 Col. L. R. 58 at 75 (1973) ..... *passim*

## PETITION FOR WRIT OF CERTIORARI

Petitioner Felipe Ruiz respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 27, 1996.

## OPINIONS BELOW

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 89 F.3d 320 and is reprinted in the Appendix at App.1-16. The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 860 F. Supp. 602 and reprinted in the Appendix at App.17-26.

## JURISDICTION

On June 27, 1996, the United States Court of Appeals for the Seventh Circuit entered its order affirming the decision of the district court. (App.1) Petitioner did not file a petition for rehearing, but did make a timely application to this Court for additional time to file his Petition, which was allowed on September 19, 1996, to and including October 30, 1996. Consequently, Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

## STATEMENT OF THE CASE

### The Underlying Claim

In 1992, Felipe Ruiz, Plaintiff-Petitioner, was an employee of Omicron Foods, Inc., a food processing business located in Schiller Park, Illinois. [A.5-6][1] Part of his duties involved the operating of a screw conveyor which had been manufactured by Custom Stainless Equipment Company, Inc. and sold to Omicron by Weiler & Company, Inc., Weiler East, Inc. and Dan Schwerdtfeger, their agent. [A.2-6] The design of the screw conveyor was highly dangerous in that it lacked adequate guarding devices, lacked adequate shutoff devices, and required the operator to be in the area of moving parts in order to run the machine. [A.6-7] On June 16, 1992, Ruiz became entangled in the mechanism, with the result that he was grievously injured, being rendered paraplegic. [A.414-16; 485-87]

### Procedural History

On July 31, 1992 Ruiz instituted an action in the Circuit Court of Cook County, Illinois [D.1], which was

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[1] Citations to the Record will be made according the following conventions: the opinions of the Seventh Circuit and the district court, being included in the appendix, will be referenced to the page number of the Appendix. Other matters will be referenced as in the Circuit Court, with materials that had been in the Short Appendix cited as "SA.___;" those in the Appendix as "A.___;" other documents in the Record on Appeal by their document number: "D.___" unless less than the entire documents is being referred to, in which case the citation will be "D.___ at ___."

thereafter removed to the Northern District of Illinois, Eastern Division. Ruiz sought damages for these injuries, naming, *inter alia;* Weiler & Company, Inc., Weiler East, Inc. and Dan Schwerdtfeger as defendants, and proceeding on various theories of recovery, including strict liability, negligence and breach of implied warranty.

Another party named as a defendant under all these theories was Blentech Corporation, which was alleged to be a successor corporation of Custom Stainless, having bought virtually all its business assets, and continuing to manufacture the same kind of machinery from Custom's old location. [A.9-10] Ultimately, on August 12, 1993, Weiler East named Custom Stainless and Blentech on the same theories in a Crossclaim for Contribution and Apportionment. It was Blentech's Motion to Dismiss and for Summary Judgment with respect to these theories that was the subject of the appeal to the Seventh Circuit.

On November 5, 1993, in response to Ruiz' Fourth Amended Complaint, Blentech filed its motion to Dismiss and For Summary Judgment as to both Ruiz and Weiler East's Crossclaim. [D.125] Blentech's position was that, while it would be a successor corporation under California law, that result would not be reached under the law of Illinois, and that the fact that both Blentech and Custom Stainless were California corporations, the agreement for Blentech's purchase of Custom's assets had been both made and performed in California, and that the particular screw conveyor, having been manufactured in California, were not dispositive, but rather that, under the significant contacts analysis, Illinois law should be applied to this issue. [D.127 at 3]

Both Ruiz and Weiler East opposed Blentech's motion, Ruiz arguing that Blentech's motion should not be granted. First, Ruiz argued that there was no real choice of law question because the parties had themselves contractually specified that California law should govern the relationship between them. [A.43-50] Alternatively, he argued that if there were a choice of law analysis to be done, with respect to the issue of what law should govern the question of Blentech's status as a successor corporation, the most significant facts favored selecting California law. [A.43-50] Finally, he argued that even if Illinois law were deemed to govern this issue, the record before the district court precluded granting Blentech's motion, since there was sufficient evidence to bring this case within Illinois' doctrine of implied assumption of liability. [A.32-35]

After the filing of Blentech's Reply Memorandum [A.342-77], including a "Supplemental Choice of Law Brief," [A.329-77] the district court, on August 14, 1994, filed its Memorandum Opinion and Order granting summary judgment in favor of Blentech. [App.17-26]

Preliminarily, the district court noted that, although Blentech's motion was styled as one for summary judgment or to dismiss, throughout the proceedings the parties had treated it as a summary judgment proceeding only, and that the court was doing likewise. [App.18-19] Moving on to the merits, it was the district court's opinion that the contractual agreement between Blentech and Custom Stainless should have no impact upon the court's consideration and, that being so, the relevant factors weighed evenly, in consequence of which the law of Illinois should be applied. [App.22] With respect to Ruiz'

argument that Blentech qualified as Custom's successor under Illinois law, the district court believed that the record was not sufficient to bring it within one of the recognized exceptions, and accordingly held that "there is simply no basis for straying from the general rule of nonliability." [App.25] Accordingly, summary judgment in favor of Blentech was ordered.

The Seventh Circuit affirmed the summary judgment entered by the district court, although, in doing so, discountenanced its entire choice-of-law analysis. As an initial matter, the Seventh Circuit noted that as the district court was sitting in diversity, it was bound to apply the choice of law principles of the forum state. [App.6] Accordingly, as Illinois has adopted the Restatement (Second) of Conflicts approach, the district court was bound to follow the choice of law method as prescribed in the Restatement and which, the court noted, is based upon the most significant contacts principle. [App.6] The principle of most significant contacts separates the choice-of-law analysis for each issue in the case and provides that the state with the most significant contacts to a particular issue will provide the law governing the resolution of that issue. [App.6] The Seventh Circuit then noted that there must be a separate choice of law analysis for each issue in order to determine the state with the most significant contacts with that issue, which analysis is conducted according to the factors set forth in the Second Restatement §§6, 145, and 188. [App.7]

According to these sections of the Second Restatement, the choice of law analysis must begin with a characterization of each issue in terms of the applicable substantive law. [App.7] "By prescribing this analytical

approach," the Seventh Circuit noted, "the Second Restatement follows the principle of dépeçage, which has been long applied in connection with various methods for choice of law." [App.7] Finding that there were only two states which had significant contacts with respect to the issues raised (California was the place of the legal relationship between Custom Stainless and Blentech, and Illinois was the place of Ruiz's residence and the place of his injury) the Court then discussed the differences between California and Illinois law with respect to the issue of corporate successor liability. [App.7] While the Seventh Circuit found that Illinois and California law were in most respects identical with respect to the issue of corporate successor liability (both states adopted a general rule of non-liability for corporate successors and also adopted four basic exceptions to this general rule), the Court noted that there was one crucial difference: California recognized a fifth exception (the product-line exception) to the general rule of non-liability. [App.8] This difference, the Seventh Circuit noted, was crucial and decisive, [App.8] for the Court held that Blentech's acquisition of Custom Stainless could not fit within any of the four exceptions common to both states. [App.8-9] However, Blentech could be held liable to Ruiz if the products line exception applied. [App.10]

The Seventh Circuit then went on to analyze the actions of the district court, which had considered only whether Illinois or California had the most significant contacts with the alleged tort. [App.10] Finding that the two states had virtually equal contacts but also finding that there was a presumption in favor of applying the law of the place of injury, the district court applied Illinois

law to all of the issues in the case, including those relevant to claims against Blentech. [App.10-11] The Seventh Circuit criticized this approach as one which "threw a single analytical blanket over all of the issues in the case," and therefore was one which departed from the accepted principles of the Second Restatement and dépeçage. [App.11-12] Rather, it held that Ruiz was right to have invoked the principles of dépeçage in attacking the district court opinion [App.11], and that the district court should have conducted one analysis for issues of successor liability and a separate analysis for issues of tort liability, because the relevant contacts for the issue of corporate successor liability are different from those relating to tort liability. [App.12]

In analyzing the significant contacts, the Seventh Circuit agreed with the Plaintiff that California law had the most significant contacts concerning the sale of assets of one California corporation to another California corporation and that, consequently, California corporate law should determine what liabilities transferred, if any, upon the sale of Custom Stainless' assets to Blentech. [App.12] Thus, the Seventh Circuit held that the "district court erred when, ignoring dépeçage, it applied Illinois law to all the issues in the case." [App.12]

Having found that the district court erred, the Seventh Circuit did not, however, apply the product-line exception recognized by California law to the case, but rather conducted a second analysis to ascertain to which area of law the exception belonged: whether it is a part of corporate law or a part of tort law. [App.12] It noted that some courts characterize the exception as a matter of corporate law, as the issue pertains only to a successor

corporation's assumption of the predecessor's liability, but that some courts characterize the exception as part of tort law. [App.12-13] This uncertainty was attributed to being the result of the fact that the exception has a variety of sources and that each source gave a different rationale for justifying the exception; each rationale, it found, would place the exception in a different area of law. After discussing several of the justifications, the Seventh Circuit held that only California's understanding of the nature of the product-line exception was relevant, and that because the Court was asked to apply a California rule through choice of law, it felt that the only California rules it was entitled to apply were the "rules of California corporate law." [App.14-15] Thus, in order for the exception to be applicable, the Court held that California had to characterize the exception as part of corporate law. [App.15] However, the Seventh Circuit found that California had established the exception as a matter of products liability law, because the exception derived from a line of cases involving strict liability for injuries resulting from defective products. [App.15] On this basis the Seventh Circuit affirmed the summary judgment in favor of Blentech Corporation.

No petition for rehearing having been filed, this Petition resulted.

## REASONS FOR GRANTING THE PETITION

The Seventh Circuit's opinion erroneously disposes of the question of Respondent's Motion for Summary Judgment in a manner which raises a question of far-

reaching importance. Hitherto, dépeçage has been applied in the same manner whenever used by any of the Circuit Courts of Appeals. The Seventh Circuit however has used dépeçage in a manner which is altogether unique and arbitrary, to entirely dispose of Plaintiff's right to a trial. What until now has been a settled (albeit inarticulated) body of legal principle has suddenly become unsettled, and a conflict has been created which will, in future cases, deprive conflict of law analysis of one of its most useful and predictable doctrines. Accordingly, Plaintiff asks the Court to review this question because the Seventh Circuit's opinion threatens to overturn a procedural doctrine about which there has never before been a question, and the Court's direction and supervision are required to assure uniformity among the circuits and guidance to the district courts with respect to the proper application of dépeçage.

Dépeçage is a subject which, to the best of Plaintiff's researches, this Court has not yet had occasion to directly discuss. We hope that will be no objection, therefore, to a few words being said about its nature and the history of its use in the jurisprudence of this country.

Prior to two decades ago, dépeçage could only be regarded as a fledgling idea in that hoary compartment of law known as conflicts. It was brought to center stage by the efforts of Professor Willis L. M. Reese, then Charles Evans Hughes Professor of Law at Columbia University and Reporter for the Restatement (Second) of Conflicts. In 1973, he authored a relatively short article on the subject of dépeçage in which, using a handful of examples from the previous decade, analyzed the concept and explained its proper operation. Professor Reese defined dépeçage as

"the process of applying the rules of different states to determine different issues in the same case." Reese, *Dépeçage: A Common Phenomenon In Choice of Law*, 73 Col. L. R. 58 at 75 (1973). Further, he prophesied that "[u]se of this process would seem to be an integral part of the modern approach to choice of law which frequently requires that choice of the applicable law should depend upon the *precise issue involved.*" [*Id.* at 75, *Emphasis added*]

While, as has been noted, Professor Reese's article was not lengthy, its subsequent importance has been vast. It is difficult to think of another piece of purely scholarly legal writing which has been more influential in the latter part of this century. For not only did Professor Reese's article provide the impetus for the adoption of dépeçage as an acceptable resource in the area of choice of law, but it also set out standards and paradigms for its proper use and application. Following the technique of illustrative examples used by the Restatements, the article became the continual source of reference and guidance for the jurisprudence which sprang up around it. Indeed, more than two decades later and in this very case, the Seventh Circuit did not fail to pay it homage. [App.7]

The universal acceptance and reliance upon the article, in addition to being a credit to a fine legal scholar, was important for an additional reason. The jurisprudence which grew up around this article and relied so heavily upon its learning, accordingly came to treat similar problems in similar ways. In short, the law of dépeçage, having a common source, has a common learning and application among all the courts which employ it. And since this is so, we can do no better, Plaintiff thinks,

than examine Professor Reese's own writings to determine some of these premises which, while articulated there, operate as unspoken assumptions in the case law itself.

The first of Professor Reese's "rules" is that courts, in making their choices of law, should seek to apply the relevant rule of the state which has the greatest concern in the determination of that issue. [*Id.* at 59] Next, dépeçage is appropriate when it would serve to effectuate the purpose of each rule applied. [*Id.* at 60, 64] Further, where the rule of the most interested state is applied, it is not a criticism that the rules of another state, though they control other issues, are invalidated. [*Id.* at 61-63] Continuing, a state has the greatest interest in its own law being applied to the relations between its own domiciliaries [*Id.* at 64], while, on the other hand, dépeçage should not be used to defeat a contract or trust. [*Id.* at 64] Finally, the application of dépeçage must avoid distortion by applying only part of a state's law, leading to a result inconsistent with the law's true purpose. [*Id.* at 65-66] is such a circumstance, Professor Reese warns, a court would not be merely choosing between possible laws, but "creating a new rule of substantive law," which is beyond the scope, and an improper use, of dépeçage. [*Id.* at 72] It is these final rules which will prove to be critical to the questions raised in this Petition.

Professor Reese's article, of course, does not have the force of law. Yet it remains that it has been the source of law, and that federal appellate decisions, having a common source, came to reach common results and to be uniform in their application of the dépeçage doctrine. This may be seen from the Court of Appeals' decisions

which deal with dépeçage. Virtually all the decisions of the appellate circuits have been written post-Reese. Despite the fact that Judge Mikva, in his dissenting opinion in the case of *In Re Korean Airlines Disaster,* 932 F.2d 1475, 1495 (D.C. Cir., 1991), rightly expressed the view that the use of dépeçage is "now routine," more than a half decade passed between the time Professor Reese's article was first published and the time the Courts of Appeals began to write on the subject. *Renyo v. Piper Aircraft,* 630 F.2d 149 (3rd Cir. 1980), *Corporacion Venezolana de Fomento v. Vintero Sales Corp.,* 629 F.2d 786 (2nd Cir. 1980), and *In Re Air Crash Disaster Near Chicago, Illinois on May 25, 1979,* 644 F.2d 594 (7th Cir. 1981) were all early expressions of approval of the use of dépeçage where different states had compelling interests in the application of their own law to differing issues in the same case. Another feature which was common to the use of dépeçage in all early cases, and consistent with Professor Reese's admonitions, was that where a given state was deemed to have the greatest interest, its law would be applied *as that state would itself apply it.*

That rule of application, if we may call it such, was not the subject of express controversy, it was simply how how dépeçage was actually employed. A number of years would pass before any decision actually turned upon an understanding of this principle, which appeared in the Second Circuit's opinion in *Hunter v. Greene,* 734 F.2d 896 (2nd Cir. 1984). *Hunter* was a case which was reversed basically because the district court had, just as in the case at bar, granted summary judgment to the defendant by failing to apply California law to an issue in which that state had the greater interest. The facts, as in most cases

involving dépeçage, are somewhat complicated. It will be enough to say that Hunter, a California resident, had sued defendants in their home-state of New York for both breach of contract and quantum meruit, based on his efforts to bring the parties together to consummate a securities transaction. The district court had determined that New York law should be applied to all issues, because of the New York Statute of Frauds. The Second Circuit however determined that dépeçage should be employed because the breach of contract claim and the quantum meruit claim were clearly distinct and separate issues, and that with respect to that latter issue, California had the greater interest. [*Id.* at 900-901] There followed discussion as to whether Hunter would have any right to recovery under California law, which required brokers to be licensed in order to receive any compensation, which Hunter was not. The court, while finding itself to be without sufficient facts to predict the outcome under California law, noted that arguments arising from the statutory requirements themselves were "not germane" for the reason that California courts routinely distinguished between finders and brokers with respect to the allowance of compensation. [*Id.* at 901] In short, the *Hunter* court insisted, in its dépeçage analysis, that California law be applied in the way that the California courts themselves would apply it. Hence *Hunter* suggests the operative rule which dove-tails with Professor Reese's admonition that the law of the state not be distorted – that the law of the chosen state be applied as the courts of that state would themselves apply it.

Significantly, in addition to the cases mentioned above, the Courts of Appeals have had occasion to mention or apply dépeçage on a dozen other occasions,[2] but we find no indication that any court has ever considered applying dépeçage in a manner different than appears in *Hunter* or was countenanced by Professor Reese's initial publication concerning the concept – not until now.

Plaintiff asks your Honors to review a decision of the Seventh Circuit which departs from a universal, albeit usually inarticulated, understanding about the proper application of dépeçage, for the Seventh Circuit's determination of the instant case is entirely contrary to all that has gone before, wants good sense or authority, and renders uncertain a matter which hitherto has been entirely settled.

The Seventh Circuit's decision commences by stating that the Plaintiff's case turns on "a rather mystifying choice-of-law problem." [App.1] Plaintiff respectfully submits that, absent the Seventh Circuit's error, there was

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[2] *La Plante v. American Honda Motor Co.*, 27 F.3d 731 (1st Cir. 1994); *Crellin Technologies v. Equipmentlease Corp.*, 18 F.3d 1 (1st Cir. 1994); *Putnam Resources v. Pateman*, 958 F.2d 448 (1st Cir. 1992); *Broome v. Antlers' Hunting Club*, 595 F.2d 921 (3rd Cir. 1979); *In Re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1992*, 821 F.2d 1147 (5th Cir. 1987); *Barton v. Drummond Co.*, 636 F.2d 978 (5th Cir. 1981); *Beard v. J.I. Case No.*, 823 F.2d 1095 (7th Cir. 1987); *Internat'l Administrators, Inc. v. Life Insurance Co. of North America*, 753 F.2d 1373 (7th Cir. 1985); *Ewing v. St. Louis-Clayton Orthopedic Group Inc.*, 790 F.2d 682 (8th Cir. 1986); *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992); *Foster v. United States*, 768 F.2d 1278 (11th Cir. 1985); *In Re Korean Airlines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C.Cir. 1991).

nothing mystifying about the problem at all. The Seventh Circuit correctly recognized whether or not Plaintiff was entitled to seek recovery against Blentech Corporation was a function of what law was to be applied to the issue of corporate successor liability. Illinois' law recognizes no exception to the general rule that a successor corporation is not liable for the debts of its predecessors because it has continued its product line. California does recognize such an exception. The district court had applied Illinois law to the entire case, holding that Illinois had the most significant contact with the case, since the Plaintiff had been injured there. The Seventh Circuit held to the contrary, stating that with respect to the issue of liability of the corporations, California law should be applied because, since Blentech and its predecessor were both California corporations, it had the greater interest in the resolution of that issue. That holding was entirely correct, but, we submit, in no way mystifying. What is mystifying is what the Seventh Circuit did next. If the Seventh Circuit would have applied California law to this issue as the courts of California would have done, there is no question that it would have determined that Blentech was subject to liability and that, therefore, the summary judgment entered in its favor was erroneous, since California law is clear as to the resolution of that issue by reason of the decision of its Supreme Court in *Ray v. Alad Corporation*, 19 Cal.3d 22, 560 P.2d 3, 136 Cal.Rptr. 574 (1977). But that is not what the Seventh Circuit did. Rather, it consulted the law of such irrelevant states as Michigan and New Jersey, as well as Illinois and California, to further parse the question of whether this one portion of California's successor liability law should be considered as falling

within the classification of its corporate law or its tort law, and determining that it should be classified as belonging to the latter, reached the conclusion, therefore, that the particular exception could not be applied to this case. [App.15] Exactly how or why the Seventh Circuit came to perform this sub-analysis is what is actually mysterious about the opinion, because it is manifest that the courts of California would not care in the least about to which classification its substantive law of this issue belonged, but would simply apply its law to the issue, finding thereby possible liability for a successor corporation. What the Seventh Circuit has done is to subdivide the law of California and re-analyze it according to ideas of its own, in order to come to the conclusion that California would regard the exception as part of its tort law rather than part of its corporate law. In so doing it has reached a point which is inherently absurd, since it is insupportable that the entire body of successor liability law should be regarded as part of a state's corporate law, except for one of many exceptions, which is classified as something else. More significantly, however, it is not the classification of the law which is critical, but how California would resolve the *issue* in question, and with respect to that it is certain that California courts would themselves regard Blentech as having potential liability.

The subdivision of California law in this manner by the Seventh Circuit is, we think, unprecedented. Certainly, it violates the accepted concepts that dépeçage should not seek to apply only part of a state's law, nor should it distort it. The Seventh Circuit's opinion is guilty of both. It has effectively made a new law, according to its

own lights, but in no way reflecting the purposes of the state which it acknowledged had the greatest interest in the resolution of this issue. In short, contrary to the Courts of Appeals' other dépeçage opinions, it has failed to apply a state's law to an issue in the way that that state would itself have done. This Court's intervention is now required.

Because of the Seventh Circuit's unprecedented action, this case presents an important question warranting review by this Court. The Seventh Circuit's opinion completely undermines a method of application which has been uniform and successful for more than twenty years. The need for uniformity among the Circuits argues in favor of the Court speaking to this issue before the proper application of dépeçage becomes controversial and the Seventh Circuit's opinion spawns lines of conflicting opinions. Accordingly this Court's immediate intervention and guidance is desperately needed. Further, that guidance should be in the form of formally declaring that dépeçage requires that, where a certain state is found to have the predominate interest in the resolution of a given issue, that issue must be resolved as the courts of that state would actually resolve it. Any other rule, including the sort of analysis undertaken by the Seventh Circuit, deprives dépeçage of its predictability as well as its uniformity. What is the point of determining what state has the greatest interest in the resolution of an issue if, having done so, the forum court goes on to resolve the issue, not as the relevant state court would have done, but according to some idea of its own, productive of a conclusion exactly opposite to the policies of the state in question?

This Court has itself used the idea of dépeçage in a number of decisions, but does not appear to have given any formal opinion detailing its proper application and use. The time is ripe for this Court to do so, lest the aberrant opinion of the Seventh Circuit work great confusion upon an area of law which has up until now been sound, predictable and stable.

## CONCLUSION

For the foregoing reasons, Petitioner Felipe Ruiz respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully Submitted,

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**IN THE**

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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No. 95-1446

FELIPE RUIZ,

*Plaintiff-Appellant,*

*v.*

BLENTECH CORPORATION,

*Defendant-Appellee.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 5838 – **Marvin E. Aspen**, *Judge.*

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ARGUED NOVEMBER 3, 1995 – DECIDED JUNE 27, 1996

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Before CUMMINGS, CUDAHY, and KANNE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Felipe Ruiz's case turns on a rather mystifying choice-of-law problem. Ruiz, a citizen of Illinois, suffered an injury in his home state from an allegedly defective product manufactured in California by a California corporation. The manufacturer has dissolved, but another California corporation has followed in its footsteps by purchasing its principal assets and continuing its business. Ruiz seeks to make the successor

corporation answer for his tort claims against the manufacturer. Illinois and California have different rules for determining when one corporation is responsible, as a successor, for the tort liabilities of its predecessors. The district court concluded that Illinois' rules, which are less favorable to Ruiz, should apply. As a consequence of this conclusion, it entered summary judgment against him. Ruiz appeals this judgment, arguing that the district court incorrectly resolved the conflict between the rules adopted, respectively, by Illinois and California. We affirm.

I.

Felipe Ruiz operated a screw conveyor in a food processing plant in Schiller Park, Illinois. On June 16, 1992, he somehow became entangled in the conveyor's machinery and sustained several grievous injuries, the most severe of which left him paralyzed. He soon filed a lawsuit in an Illinois state court, bringing claims of strict products liability and negligence, among others. The case was removed to the district court on the basis of diversity jurisdiction.

Ruiz eventually directed his case at five defendants, all of whom had some legally significant connection with the screw conveyor. Three of the five had been involved in the sale of the conveyor to Ruiz's employer. These defendants were Weiler and Company, a Wisconsin corporation, Weiler East, a New Jersey corporation, and Dan Schwerdtfeger, an agent for those two companies. Another defendant was Custom Stainless Equipment, the

California corporation that had manufactured the conveyor in 1983 and had dissolved in 1986. The last defendant was an entity that Ruiz identified as the successor to Custom Stainless' liabilities in tort. When Custom Stainless dissolved, it sold all of its assets for cash to Blentech, another California corporation. Blentech continued to manufacture Custom Stainless' product lines under its own name, using the same product designs, the same factory, the same management and the same employees. Ruiz contended in the district court that California law defined the relationship between Custom Stainless and Blentech and, therefore, between Blentech and himself. According to Ruiz's interpretation of that law, Blentech's assimilation of Custom Stainless included an assumption of strict liability for any defective products that Custom Stainless had manufactured.

Schwerdtfeger and the two Weilers settled with Ruiz, and Ruiz won a default judgment against the defunct Custom Stainless. The fifth defendant, Blentech, resisted Ruiz's claim by arguing that it did not belong in the case at all. Blentech maintained that its purchase of Custom Stainless' assets had not involved a conveyance of Custom Stainless' tort liabilities, and it made this argument the basis for a motion for summary judgment. The district court held that Illinois law defined the relationship between Custom Stainless, Blentech and Ruiz, and that Illinois law would not permit Ruiz to sustain an action against Blentech. Therefore, the court granted summary judgment to Blentech. *See Ruiz v. Weiler*, 860 F. Supp. 602, 604-06 (N.D. Ill. 1994).

II.

Ruiz appeals the entry of summary judgment in Blentech's favor. When considering a summary judgment, our review of matters both factual and legal is *de novo. Apperson v. E.I. du Pont de Nemours & Co.*, 41 F.3d 1103, 1106 (7th Cir. 1994). Of course there are not issues of fact; Ruiz only contests the district court's legal rulings. He contends that the district court erred by holding that Illinois tort law determined the nature of Blentech's liabilities as a successor to Custom Stainless. He believes that California corporate law should inform this determination and that it prescribes a result favorable to him. He also argues that, even if Illinois law applies, the district court misinterpreted its prescriptions regarding the products liability of successor corporations.

A.

As an initial matter, Blentech questions whether we have jurisdiction to consider these arguments. It maintains that the summary judgment against it is not the product of a final order under the terms of Federal Rule of Civil Procedure 54(b) and, as such, is not yet appealable.

When a case involves multiple claims against multiple parties, as this one does, Rule 54(b) provides that the district court can put in final form orders with respect to individual claims in one of two ways. When the court enters an order that disposes of a part of the case, it can make an express determination that the order is a final judgment. Alternatively, it can put in final form each of

the orders involving individual claims by disposing of all of the claims together.

Blentech suggests that the district court did not put the summary judgment in Blentech's favor in final form through either of these means. The record shows that the district court has not expressly determined that the summary judgment is a final judgment; and Blentech contends that the district court has not yet disposed of Ruiz's companion claim against Custom Stainless. Although it acknowledges that the district court granted Ruiz's motion for a default judgment against Custom Stainless, Blentech believes that the district court had not fixed the damages to which Ruiz is entitled. As Blentech points out, our cases have held that an order fixing liability but not damages is not a final order. *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994); *Kaszuk v. Bakery & Confectionery Union*, 791 F.2d 548, 553 (7th Cir. 1986).

But, in some situations, a district court can issue a final order granting a motion for a default judgment without explicitly fixing damages. When a party moves for a default judgment, presents substantial evidence supporting its request for damages and encounters no meaningful opposition, the district court's decision to grant the motion includes an implicit assessment of the damages in the requested amount. *See O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1404-05 (7th Cir. 1993).

This rule applies here. On December 7, 1994, Ruiz moved for a default judgment against Custom Stainless, requesting damages of $8 million and providing extensive evidence to substantiate that request. Blentech

opposed this motion, but the district court concluded that it did not have standing to do so and therefore disregarded its arguments. In an order of January 19, 1995, the court granted Ruiz's motion for default judgment against Custom Stainless. This grant included an implicit assessment of damages against Custom Stainless of $8 million. This order is, therefore, final. Because the district court had also entered final orders against all of the other defendants, the order granting summary judgment for Blentech is final and appealable.

B.

Ruiz's challenge to the summary judgment for Blentech relies on his argument that the choice of state law governing the crucial issues in the case was in error. In a diversity case, of course, state law governs, and the district court determines what state law to apply in accordance with the choice-of-law principles of the state in which it sits. *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995). The district court here was bound by the choice-of-law method defined by the Restatement (Second) of Conflicts of Law, which Illinois has adopted. *Ingersoll v. Klein*, 262 N.E.2d 593, 595 (Ill. 1970).

The Second Restatement method is constructed around the principle that the state with the most significant contacts to an issue provides the law governing that issue. *See id.* at 594-95. A court therefore conducts a separate choice-of-law analysis for each issue in a case, attempting to determine which state has the most significant contacts with that issue. *International Adm'rs, Inc. v.*

*Life Ins. Co. of North America*, 753 F.2d 1373, 1376 n.4 (7th Cir. 1985). The Second Restatement enumerates specific factors that identify the state with the most significant contacts to an issue, and the relevant factors differ according to the area of substantive law governing the issue and according to the nature of the issue itself. *See, e.g.*, Restatement (Second) at §§ 6, 145, 188. To properly apply the Second Restatement method, a court must begin its choice-of-law analysis with a characterization of the issue at hand in terms of substantive law. *Id.* at § 7. By prescribing this analytical approach, the Second Restatement follows the principle of *dépeçage*,[1] which has been long applied in connection with various methods for choice of law. *See* Willis L.M. Reese, *Dépeçage:* A Common Phenomenon in Choice of Law, 73 Colum. L. Rev. 58 (1973).

With respect to Ruiz's claim against Blentech, the choice-of-law analysis had crucial importance. Only two states have significant contacts with the issues raised. California was the place of the legal relationship between Custom Stainless and Blentech; and Illinois was the place of Ruiz's residence and his injury. The decisive issue in the case was whether Blentech had succeeded to Custom Stainless' liabilities by virtue of its purchase of Custom Stainless' assets and its business. Illinois and California shared a basic rule about corporate successor liability, but

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[1] When roughly translated, depecage refers to the process of cutting something into pieces. Here it refers to the process of cutting up a case into individual issues, each subject to a separate choice-of-law analysis.

California provided an exception to that rule that was not available in Illinois.

Illinois mandates that, as a general rule of corporate law, a corporation that purchases the principal assets of another corporation does not assume the seller's liabilities arising from tort claims or from any other kind of claims. *Hernandez v. Johnson Press Corp.*, 388 N.E.2d 778, 779-80 (Ill. App. 1 Dist. 1979); *Alexander v. State Savings Bank & Trust Co.*, 281 Ill. App. 88, 96 (1 Dist. 1935). Illinois does recognize four exceptions to this rule. The purchasing corporation assumes the seller's liabilities when: (1) it expressly agrees to assume them; (2) the asset sale amounts to a *de facto* merger; (3) the purchaser is a mere continuation of the seller; (4) the sale is for the fraudulent purpose of escaping liability for the seller's obligations. *Hernandez*, 388 N.E.2d at 779-80. California's corporate law establishes the same general rule and the same four exceptions. *Ray v. Alad Corp.*, 560 P.2d 3, 7 (Cal. 1977).

California departs from the Illinois rules, however, by adopting a fifth exception. That exception provides that a corporation that purchases a manufacturing business and continues to produce the seller's line of products assumes strict liability in tort for defects in units of the same product line previously manufactured and distributed by the seller. *Ray*, 560 P.2d at 11. This "products line" exception applies in cases involving tort claims where: (1) the plaintiff lacks an adequate remedy against the seller/manufacturer; (2) the purchaser knows about product risks associated with the line of products that it continues; and (3) the seller transfers good will associated with the product line. *Lundell v. Sidney Mach. Tool Co.*, 190 Cal. App. 3d 1546, 1551-56, 236 Cal. Rptr. 70, 74-78 (1987).

The difference between Illinois' and California's rules is decisive here because Ruiz's case against Blentech depends entirely upon whether the "products line" exception applies. Although Ruiz does argue that he can maintain a cause of action against Blentech even without this exception, it is clear that he cannot do so under the basic rule of successor liability, which both Illinois and California share. Blentech did not acquire Custom Stainless' obligations to Ruiz under one of the four standard exceptions to the general rule of successor liability. Blentech has not agreed to assume that obligation. It did expressly agree to assume all of Custom Stainless' tort liabilities arising before the date of the asset sale in 1986, but it emphatically disclaimed all liabilities arising after that date, and Ruiz was not injured until 1992. Neither did Blentech and Custom Stainless combine their corporate identities, either through a *de facto* merger or through some other means. In either Illinois or California, a court will conclude that an asset sale merges two corporations or makes the buyer the continuation of the seller only if it finds an identity of ownership between the two. In effect, the *de facto* merger and continuation exceptions are identical; each exception depends upon an identity of ownership between the seller and purchaser. *See Green v. Firestone Tire & Rubber Co., Inc.*, 460 N.E.2d 895, 899-900 (Ill. App. 2 Dist. 1984); *Ray*, 560 P.2d at 7; *Stanford Hotel Co. v. M. Schwind Co.*, 181 P. 780 (Cal. 1919). When Custom Stainless sold its assets to Blentech, Custom Stainless' owners received cash, not stock, and they have not participated in the ownership of Blentech in any way. Finally, Ruiz makes no allegation that the asset sale between Blentech and Custom Stainless was an occasion

for fraud; moreover, nothing in the record even remotely supports such an allegation. Thus, Blentech can be liable to Ruiz only if the "products line" exception applies.

The "products line" exception can apply in Illinois courts only through the choice of foreign law. On numerous occasions, Illinois courts have specifically declined to make the "product line" exception part of Illinois law, and they have therefore declined to apply it to tort claims governed by Illinois law. *See, e.g., Myers v. Putzmeister, Inc.*, 596 N.E.2d 754, 757-58 (Ill. App. 1 Dist. 1992); *Kaleta v. Whittaker Corp.*, 583 N.E.2d 567, 573 (Ill. App. 1 Dist. 1991); *Gonzalez v. Rock Wool Eng'g & Equip. Co., Inc.*, 453 N.E.2d 792, 796 (Ill. App. 1 Dist. 1983); *Nguyen v. Johnson Mach. & Press*, 433 N.E.2d 1104, 1106-07 (Ill. App. 1 Dist. 1982); *Domine v. Fulton Iron Works*, 395 N.E.2d 19, 23 (Ill. App. 1 Dist. 1979); *Hernandez*, 388 N.E.2d at 781-82. Illinois courts have not, however, specifically decided whether they would apply the "products line" exception to an issue governed by the law of a state which accepted that exception. Our research of Illinois law suggests that the crucial issue in this case is a matter of first impression in Illinois.

As it must, Ruiz's challenge to the district court's decision depends upon the contention that an Illinois court would choose California's "products line" exception as part of the law governing his claim against Blentech. In deciding whether to apply Illinois or California law, the district court considered whether Illinois or California had the most significant contacts with the tort that Ruiz alleged. *Ruiz v. Weiler & Co., Inc.*, 860 F. Supp. 602, 604 (N.D. Ill. 1994). It found that the two states had

essentially equal contacts with Ruiz's action, but it concluded that the balance tipped towards Illinois because there is a presumption in favor of applying the laws of the state where the alleged tort occurred. *Id.* (citing *Pittway Corp. v. Lockheed Aircraft Corp.*, 641 F.2d 524, 526 (7th Cir. 1981)). On the basis of this conclusion, the district court applied Illinois law to all of the issues in the case, including both of the issues relevant to Ruiz's claim against Blentech.

Ruiz argues that the district court's choice-of-law analysis was fundamentally flawed because it failed to follow the principles of *dépeçage*. As we have noted, these principles prescribe that the rules of different states can determine different issues in a single case. In Ruiz's view, the issue of Blentech's assumption of Custom Stainless' tort liabilities is separate and distinct from other issues in the case; and he believes it requires an analysis of significant contacts different from the one that the district court performed. When he applies the principles of *dépeçage* to this issue, Ruiz concludes that the district court should have determined the legal relationship between Custom Stainless and Blentech according to California law with its "products line" exception.

Ruiz correctly invokes the principle of *dépeçage* and persuasively criticizes the district court's choice-of-law analysis. The district court threw a single analytical blanket over all of the issues in the case, and this is, of course, a departure from the prescriptions of the Second Restatement. The district court should have conducted one analysis for issues of successor liability and a separate

analysis for issues of tort liability. As a matter of corporate law, the issue of successor liability pertains to different significant contacts than does the tort law issue of liability for Ruiz's injury. California clearly has the most significant contacts with a sale of corporate assets by one California corporation to another. Here both corporations have their principal places of business in California. Consequently, California corporate law should determine what liabilities, if any, were conveyed when Custom Stainless sold its business to Blentech. It is equally clear that Illinois has the most significant relationship to an alleged tort befalling one of its citizens within its borders. The district court erred when, ignoring *dépeçage*, it applied Illinois law to all the issues in the case.

The question we now encounter is whether that error makes any difference here. Ruiz certainly believes that it does. He characterizes California's "product line" exception as a rule of corporate law – a relative of the other four exceptions to the rule determining corporate successor liability. Unlike his argument about the flaws in the district court's choice-of-law analysis, this contention is not so clearly correct. The area of substantive law to which the "product line" exception belongs is a difficult question, and the courts of several states have struggled to decide whether it is a part of corporate law or of tort law.

This struggle has been especially evident in Illinois. As we have noted, Illinois courts have often considered whether to make the "products line" exception a part of Illinois law. In opinions addressing this issue, they have advanced various explanations of the nature of this exception. Consequently, the Illinois precedents contain

conflicting characterizations of the exception. Many of these cases insist that there is one and only one way to characterize this rule in terms of substantive law, but these same courts do not agree about what that interpretation would be. *Compare Kramer v. Weedhopper of Utah, Inc.*, 562 N.E.2d 271, 276 (Ill. App. 1 Dist. 1990) *and Barron v. Kane & Roach, Inc.*, 398 N.E.2d 244, 246 (Ill. App. 1 Dist. 1979) *with Nguyen*, 433 N.E.2d at 1109. The Appellate Court (First District) of Illinois aptly describes the conflict over the nature of the exception:

> if the issue [at the heart of the "products line" exception] is solely one of the assumption of the predecessor's potential liability, we find it difficult to understand how corporate law can be ignored in making the decision. Strict liability law has no principles to determine successor corporate liability. If the issue is whether the successor owes an independent duty to the plaintiff, then strict liability principles could be used to determine the issue. However, when the issue is the successor corporation's assumption of the predecessor's liability, then corporate principles must guide the decision.

*Nguyen*, 433 N.E.2d at 1109. Some courts have resolved this struggle by deciding that the "products line" exception is a matter of tort law. *See, e.g., Kramer*, 562 N.E.2d at 276; *Barron*, 398 N.E.2d at 246. Others have concluded that the exception must be a matter of corporate law. *See, e.g., Nguyen*, 433 N.E.2d at 1109 (resolving its struggle by concluding that "the issue is . . . whether the policies and principles of strict liability justify a change in corporate law"); *Green*, 460 N.E.2d at 900-01 (suggesting that the exception can be a matter of corporate law in some cases).

Part of the uncertainty over the nature of the "products line" exception comes from the fact that the exception has a variety of sources each of which articulates a different rationale for the exception and each of which places it within a different realm of substantive law. The way in which the exception is characterized may depend upon the source from which it comes. Michigan law has apparently established the "products line" exception as a means of making it easier to prove that the predecessor and successor corporations have effected a *de facto* merger, although the reasoning behind this conclusion is not entirely clear. *See Turner v. Bituminous Casualty Co.*, 244 N.W.2d 873, 879-80 (Mich. 1976). Therefore, in Michigan, the exception seems to be an instrument of corporate law that defines what must pass through an asset sale. In New Jersey, on the other hand, the supreme court has held that the exception has nothing to do with determining whether a *de facto* merger occurred. Instead, the court there held that the exception is an instrument for preserving the system of strict liability for products liability claims by imposing duties on manufacturers. *See Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 819-20 (N.J. 1981).

For our purposes, California's understanding of the nature of the "products line" exception is what matters. *See* Restatement (Second) at § 7(3). At least with respect to this argument, Ruiz does not ask us to generate an abstract version of the exception out of the air and make it a part of Illinois law. In any event, this would be a futile effort because Illinois courts have so emphatically rejected this request when other claimants have made it. *See Myers*, 596 N.E.2d at 758 (citing cases). Ruiz does, however, ask us to apply a California rule to his case

through choice of law. Because the only California rules that we can apply here are the rules of corporate law, we must see whether California characterizes the "products line" exception as a matter of corporate law.

California courts have quite clearly established that the exception is a matter of products liability law, not corporate law. The California Supreme Court derived the exception from its line of cases prescribing strict liability in tort for injuries resulting from defective products. *See Ray*, 560 P.2d at 8-9 (discussing the landmark products liability cases of *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963) and *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944)). Moreover, California has limited the application of the exception to cases in which it preserves a plaintiff's ability to collect on a valid strict liability claim. *See Lundell*, 190 Cal. App. 3d at 1556, 236 Cal. Rptr. at 78. In this way, California has established the "products line" exception as a means of advancing the cost-shifting purposes behind its regime of strict liability for injuries caused by defective products. Unlike Michigan, California has not employed the exception generally as a means to limit efforts by corporations to erase corporate identity in the course of asset sales. Instead, California uses the exception to insure that manufacturers generally will bear the costs of defective products.

As we have noted, Ruiz could maintain his case against Blentech only if the "products line" exception applied. Because the exception is a matter of California

tort law, not California corporate law, it does not apply to this case. The judgment of the district court is, therefore,

AFFIRMED.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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|---|---|
| FELIPE RUIZ,<br><br>Plaintiff,<br><br>V.<br><br>WEILER & COMPANY, INC., a corporation, DAN SCHWERDTFEGER, WEILER EAST, INC., a corporation, CUSTOM STAINLESS EQUIPMENT COMPANY, INC., a corporation, and BLENTECH CORPORATION, a corporation,<br><br>Defendants. | Case No.<br>92 C 5838 |
| ZURICH AMERICAN INSURANCE COMPANY,<br><br>Intervening-Petitioner. | |
| WEILER EAST, INC.<br><br>Defendant/<br>Cross-Plaintiff,<br><br>v.<br><br>CUSTOM STAINLESS EQUIPMENT COMPANY INC. and BLENTECH CORPORATION,<br><br>Cross-Defendants. | |

WEILER EAST, INC.,

Defendant/Cross-Plaintiff/
Third-Party Plaintiff,

v.

J&S PROVISION, INC. and OMICRON FROZEN FOODS, INC., CUSTOM STAINLESS EQUIPMENT COMPANY, INC. and BLENTECH CORPORATION,

Third-Party Defendants.

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WEILER & COMPANY, INC.

v.

CUSTOMS STAINLESS EQUIPMENT COMPANY, INC., BLENTECH CORPORATION and WEILER EAST, INC.,

Cross-Defendants.

## MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Plaintiff Felipe Ruiz brings this five-count complaint sounding in strict products liability, negligence, breach of warranty, and professional negligence. Presently before the court is defendant Blentech Corporation's motion for summary judgment against plaintiff Ruiz and cross-claimant Weiler East, Inc.[1] For the reasons set forth below, Blentech's motion is granted.

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[1] Although Blentech has titled its motion a motion to "dismiss and for summary judgment," it is essentially a motion

## I. Background

Plaintiff Felipe Ruiz alleges that he was injured while working with or near a "screw conveyer" machine at his place of employment, Omicron Foods, Inc. in Illinois. The screw conveyer had been designed and manufactured by defendant Custom Stainless Equipment Company[2] sometime in 1983, and was sold to Laredo Packing Company in Texas. When Laredo went out of business, the screw conveyor was purchased by defendant Weiler East, Inc. ("Weiler East"), in conjunction with defendants Daniel Schwerdtfeger and Weiler & Co. ("Weiler"), for resale to Omicron Foods, Inc.[3] The accident involving Ruiz occurred on June 18, 1992, approximately two and one half years after the used screw conveyor was sold to Omicron Foods. Ruiz then brought this suit, naming Weiler, Schwerdtfeger, Weiler East, Custom, and Blentech

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for summary judgment, and has been treated by the parties as such. Accordingly, we shall likewise treat it as a motion for summary judgment.

[2] Custom dissolved in 1986. The bulk of its assets were purchased with cash by defendant Blentech Corporation. It is undisputed that no member of the Custom Board of Directors became a member of Blentech's Board of Directors, and no shares of Blentech stock were ever exchanged for the purchase of Custom's assets.

[3] While the relationship among the various defendants is not exactly clear, it appears that Weiler East is a distributor of new equipment manufactured by Weiler, which in turn employs Schwerdtfeger as a sales representative. With respect to the product at issue in the present action, Weiler apparently engaged Weiler East to obtain a used screw conveyer for sale to Omicron as an incentive to Omicron to purchase new Weiler equipment.

as defendants. Weiler East subsequently filed a cross-claim against Custom and Blentech.

## II. Summary Judgment Standard

Under the Federal Rules of Civil Procedure, summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This standard places the initial burden on the moving party to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Rule 56(c)). Once the moving party has done this, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must read all facts in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986); *Griffin v. Thomas*, 929 F.2d 1210, 1212 (7th Cir. 1991).

## III. Discussion

When Blentech filed the motion presently before the court, it became readily apparent that many of the issues raised in that motion hinged in large part upon the law to be applied in this action. We therefore provided the parties an opportunity to supplement their submissions to this court with briefs regarding the choice of law issue.

Because the determination of this issue is central to our consideration of the motions, we shall address it first.

In a diversity case where the law of two or more jurisdictions arguably applies, the federal court looks to the choice of law rules of the forum state to determine which jurisdiction's law should be used. *Goldberg v. Medtronic, Inc.*, 686 F.2d 1219, 1225 (7th Cir. 1982). In tort actions, Illinois applies the "most significant contacts" test outlined in the Restatement (Second) of Conflict of Laws (1971). *Ingersoll v. Klein*, 262 N.E.2d 593, 595 (Ill. 1970). The factors to be considered in determining which state has the most significant contacts include:

> (a) The place where the injury occurred. (b) The place where the conduct occurred. (c) The domicile, nationality, place of incorporation and place of business of the parties. (d) The place where the relationship of the parties is centered.

*id.* at 596 (quoting Tentative Draft No. 9 of section 379, Restatement (Second) of Conflict of Laws). In the present case, the injury occurred in Illinois, while the "conduct," i.e. the allegedly defective design or manufacture of the screw conveyer, occurred in California. The plaintiff is domiciled in Illinois, while Blentech is incorporated in California and Weiler East is incorporated in New Jersey. Finally, although neither Ruiz, his employer, nor Weiler East have had any direct dealings with Blentech, this action at core relates to the sale of an allegedly defective machine to Ruiz' employer in Illinois. In sum, the two obvious possibilities for the state with the "most significant contacts" are Illinois and California. Given the above factors, we conclude that Illinois has contacts to this action at least equal to those of California; where two

locales are equally appealing with respect to choice of law, there is a presumption in favor of using the laws of the state in which the injury occurred. *Pittway Corp. v. Lockheed Aircraft Corp.*, 641 F.2d 524, 526 (7th Cir. 1981); *Firkin v. United States Polychemical Corp.*, 91 C 3660, 1993 WL 398811, at *1 (N.D. Ill. Sept. 2, 1993). As a result, we will apply Illinois law in our consideration of Blentech's motion. *Cf. Kramer v. Weedhopper of Utah, Inc.*, 562 N.E.2d 271, 276 (Ill. App. Ct. 1990) ("In applying the test to the case at bar, Illinois has the most significant relationship in that the possible tort liability derives from applications of Illinois products liability law; the injury occurred in Illinois; and the relationship of all the parties is centered in Illinois.").[4]

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[4] Ruiz also argues that California law should apply, at least with respect to Blentech, because the agreement between Custom and Blentech regarding the sale of Custom's assets to Blentech provides that "[t]his Agreement and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California." Because the parties themselves have agreed which law should apply, Ruiz claims, there is no choice of law issue. It is clear, however, that the above provision only applies to issues arising *out of the Agreement*. As an Illinois Appellate Court noted in rejecting a similar claim:

> [T]he question of successor liability has little to do with construing the provisions of the contract. . . . The claim does not arise under the provisions of this agreement, but out of strict tort liability based on common law theories of successor corporations products liability.

*Barron v. Kane & Roach, Inc.*, 398 N.E.2d 244, 246 (Ill. App. Ct. 1979). *See also Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977) ("[T]hough the contract may be interpreted under 'Ohio law,' the questions of traditional tort law are to be determined in

Having decided that Illinois law applies to this action, we now turn to the merits of Blentech's summary judgment motion. Blentech asserts that, as a mere purchaser of Custom's assets, it can not be held liable under Illinois law for Custom's debts and liabilities. *Green v. Firestone Tire & Rubber Co.*, 460 N.E.2d 895, 898 (Ill. App. Ct. 1984) (citation omitted). Weiler East does not contest Blentech's assertion that Blentech is entitled to summary judgment under Illinois law, and we therefore grant Blentech's motion with respect to Weiler East. Ruiz, on the other hand, maintains that, even applying Illinois law, Blentech is liable under one of the exceptions to the general rule stated above. In *Green*, the court recognized four exceptions to the nonliability rule:

> (1) where there is an express or implied agreement of assumption; (2) where the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations.

*Green*, 460 N.E.2d at 898-99. Ruiz argues that the first exception applies, because the agreement between Blentech and Custom includes the following provision:

> [Custom's president] shall cause Custom Stainless to pay, or cause Custom Stainless to segregate the funds to pay, up to fifty percent (50%)

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accords with the law of Indiana, the situs of the injury and domicile of the plaintiff."). The terms of the agreement between Custom and Blentech therefore have no impact upon our choice of law analysis.

> of the cost of insurance obtained by Blentech for a period of three years following the Closing Date under the purchase Agreement, up to a maximum of $50,000 covering products liability claims on products manufactured by Custom Stainless prior to the closing date.

Ruiz concludes that this amounts to an implied agreement of assumption. We disagree. We initially observe that the agreement between the companies expressly states that Custom's president "shall indemnify and hold Blentech and the property of Blentech and its business free and harmless from any and all claims, losses, damages, injuries and liabilities . . . relating to or arising out of" various claims against Custom, including products liability actions relating to products manufactured by Custom prior to the date of the sale. This explicit language strongly militates against a finding of assumption of liability. Furthermore, the insurance provision quoted above does not dictate a contrary conclusion. In *Green* the sale agreement provided that the buyer would include the seller as a named assured in all products liability insurance policies for five years after the sale, and that the seller would pay any additional cost which resulted from this action. The court concluded that, as a matter of law, this did not amount to an implied assumption of liability, expressly noting that "there is a difference between agreeing to include a predecessor corporation as a named assured and agreeing to assume the liabilities of that corporation." *Green*, 460 N.E.2d at 899. In the present case, Blentech maintains that the insurance provision was included in the agreement for the purpose of providing Blentech the means to defend against lawsuits arising out of pre-agreement sales of Custom products, rather than

assuming liability for those products. Indeed, the $50,000 was apparently used to pay attorney's fees in an action in Iowa in which Blentech obtained summary judgment. The analysis in *Green* is equally applicable here; in some respects, this is even a stronger case than *Green*, because there is no indication that the agreement in that case included a provision expressly *disclaiming* any assumption of liability, as exists in the present case. Accordingly, we find that the first exception does not apply.

Additionally, it is apparent that the second and third exceptions are equally inapplicable. In *Nilsson v. Continental Machine Manufacturing Co.*, 621 N.E.2d 1032 (Ill. App. Ct. 1993), the court explained these exceptions:

> The mere continuation exception applies where a corporate reorganization has taken place, so that the corporation has simply "put on a new coat." A merger, on the other hand, involves the combining of two existing corporations into a single successor corporation. As noted, Illinois courts have consistently required identity of ownership before imposing successor liability under either theory.

*Nilsson*, 621 N.E.2d at 1034-35 (citations omitted). In the present case, it is undisputed that there is no identity of ownership between the two companies. Accordingly, these exceptions do not apply.[5] In sum, there is simply no basis for straying from the general rule of nonliability. As a result, Blentech is entitled to summary judgment.

---

[5] Ruiz has not asserted that the fourth exception is applicable.

## IV. Conclusion

For the reasons set forth above, we grant Blentech's motion for summary judgment. It is so ordered.

/s/ Marvin E. Aspen
MARVIN E. ASPEN
United States
District Judge

Dated 8-15-94

**United States District Court**

**NORTHERN DISTRICT OF ILLINOIS**

| | |
|---|---|
| **Felipe Ruiz** | **JUDGMENT IN A CIVIL CASE** |
| **V.** | **CASE NUMBER:** |
| **Weiler & Col,etal** | **92 C 5838** |
| | **(Filed Aug. 19, 1994)** |

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_____ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendant Blentech's motion for summary judgment is granted.

| | |
|---|---|
| August 15, 1994 | H. Stuart Cunningham |
| *Date* | *Clerk* |
| | /s/ Illegible |
| | *(By) Deputy Clerk* |

# OPPOSITION

# BRIEF

Supreme Court, U.S.
FILED
DEC 2 1996
CLERK

No. 96-687

In The

# Supreme Court of the United States

October Term, 1996

FELIPE RUIZ,

*Petitioner,*

vs.

BLENTECH CORPORATION, a California corporation,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether petitioner has demonstrated any ground for this Court exercising jurisdiction under Supreme Court Rule 10 where the petition asks this Court to review whether a court of appeals properly applied California law in a products action based on diversity of citizenship.

Whether, assuming jurisdiction lies, the court of appeals properly affirmed the entry of summary judgment under California law where respondent was not liable as corporate successor for a product which another corporate defendant designed, manufactured and sold three years before that defendant was dissolved.

Whether, in the alternative, the district court properly granted summary judgment on the basis that respondent was not liable as corporate successor to another corporate defendant under Illinois law.

## LIST OF INTERESTED PARTIES

The following is a complete list of all parties to the litigation.

Petitioner herein and plaintiff below was Felipe Ruiz.

Respondent herein and one of the defendants below was Blentech Corporation, a California corporation.

Other defendants who are no longer parties were Weiler & Company, Inc., a corporation; Dan Schwerdtfeger; Weiler East, Inc., a corporation; Zurich American Insurance Company; J&S Provision, Inc., a corporation; Omicron Frozen Foods, Inc., a corporation; and Custom Stainless Equipment Company, Inc., a California corporation.

TABLE OF CONTENTS

Page

Questions Presented ..... i

List of Interested Parties ..... ii

Table of Contents ..... iii

Table of Citations ..... v

Statement of Jurisdiction ..... 1

Statement of the Case ..... 2

A. COURSE OF PROCEEDINGS AND DISPOSITION OF CASE BELOW ..... 3

B. CORRECTION OF MISSTATEMENTS IN PETITION AND PROCEEDINGS BELOW ..... 5

Reasons for Denying the Writ ..... 20

I. THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S ARGUMENTS UNDER RULE 10 ..... 20

II. IN ANY EVENT, UNDER CALIFORNIA LAW, BLENTECH WAS NOT LIABLE AS CORPORATE SUCCESSOR TO CUSTOM STAINLESS FOR A PRODUCT WHICH CUSTOM STAINLESS DESIGNED, MANUFACTURED AND SOLD THREE YEARS BEFORE CUSTOM STAINLESS DISSOLVED ..... 22

III. IN THE FURTHER ALTERNATIVE, THE DISTRICT COURT PROPERLY DETERMINED THAT BLENTECH WAS NOT LIABLE AS A SUCCESSOR CORPORATION TO CUSTOM STAINLESS UNDER ILLINOIS LAW ..... 25

TABLE OF CONTENTS – Continued

Page

A. BLENTECH DID NOT EXPRESSLY OR IMPLIEDLY ASSUME LIABILITY; ON THE CONTRARY, THE AGREEMENT CONTAINS A DISCLAIMER..... 26

B. THE SALE OF CERTAIN ASSETS BY CUSTOM STAINLESS TO BLENTECH WAS NOT A CONSOLIDATION OR MERGER OF THE SELLER WITH THE PURCHASER CORPORATION ..... 28

C. THE DISTRICT COURT PROPERLY FOUND THAT BLENTECH WAS NOT MERELY A CONTINUATION OF CUSTOM STAINLESS..... 29

Conclusion ..... 30

# TABLE OF CITATIONS

Page

CASES CITED:

*Fenderson v. Athey Products Corp.*, 220 Ill. App. 3d 832, 581 N.E.2d 288 (1981) ..... 29

*Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 460 N.E.2d 895 (1984) .....25, 27, 28, 29, 30

*Hernandez v. Johnson Press Corp.*, 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979).....25, 28, 29

*Johnson v. Marshall & Huschart Machinery Co.*, 66 Ill. App. 3d 766, 384 N.E.2d 141 (1978) ..... 25

*Kramer v.Weedhopper of Utah, Inc.*, 204 Ill. App. 3d 469, 562 N.E.2d 271 (1990)..... 23

*Lundell v. Sidney Machine Tool Co.*, 190 Cal. App. 3d 1546, 236 Cal.Rptr. 70 (1987)..... 23

*Nguyen v. Johnson Machine & Press Corp.*, 104 Ill. App. 3d 1141, 433 N.E.2d 1104 (1982).....29, 30

*Ray v. Alad Corp.*, 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977) .....22, 23, 24

*Stewart v. Telex Comm., Inc.*, 1 Cal. App. 4th 190, 1 Cal.Rptr. 2d 669 (1991) ..... 23

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Blentech Corporation, a California corporation (hereinafter referred to as "Blentech"), requests that the Court deny the petition for *writ of certiorari* seeking review of the opinion and judgment of the Seventh Circuit Court of Appeals reported at 89 F. 3d 320 (June 27, 1996), *petition for cert.* filed October 30, 1996 (No. 96-687).

## STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). Under Supreme Court Rule 10, this Court will grant a petition for *writ of certiorari* when a decision of the United States Court of Appeals has conflicted with a decision of another United States Court of Appeals on the same important matter, or has decided an important federal question in a way that conflicts with a decision by a state court of last resort, or has so far departed from the accepted and usual course of judicial proceedings or so sanctioned such a departure by a lower court as to call for the exercise of this Court's supervisory power. The decision of the United States Court of Appeals for the Seventh Circuit in this case does not conflict with any decision from another circuit court of appeals, nor decided any federal question, nor so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure as to call for the exercise of this Court's supervisory power. At most, petitioner simply complains that the Circuit Court of Appeals did not

apply California law in the same way as the California Supreme Court would decide the case if the case had come before it. That is a question of state law and hardly presents a compelling reason to occasion the exercise of judicial discretion to grant the writ.

## STATEMENT OF THE CASE

Respondent respectfully opposes the petition for *writ of certiorari* which contains a number of factual and legal misstatements.

For example, petitioner's statement of the case contains the incredible assertion that Blentech's position in seeking summary judgment was that it would be a "successor corporation under California law," but that result would not be reached under the law of Illinois (petition at 3). Although the district court did resolve the issue of liability in Blentech's favor under Illinois law, Blentech had also argued in the district court that it owed no liability even under California law (R155, 156). Petitioner's assertion is a blatant mischaracterization of respondent's arguments raised at a number of places in the record. If respondent had neglected to argue that it was not subject to successor liability under California law, the Seventh Circuit applying California law would have reversed the judgment. It was and is respondent's position that it is not a successor corporation under either Illinois or California law.

While respondent understands petitioner's desperate desire to capture this Court's attention with a number of entreaties, deception is never appropriate. Unfortunately, petitioner's deception continues throughout his petition.

## A. COURSE OF PROCEEDINGS AND DISPOSITION OF CASE BELOW

This product and negligence action was brought by petitioner, Felipe Ruiz, for injuries he received while working with or near food processing machinery while employed by Omicron Foods, Inc. (hereinafter referred to as "Omicron"), in Schiller Park, Illinois. The machine had been designed and manufactured by Custom Stainless Equipment Company, Inc. (hereinafter referred to as "Custom Stainless") in California sometime in 1983, then sold to a company in Texas, before it was purchased by another named defendant, Weiler East, Inc. (hereinafter referred to as "Weiler East"), in conjunction with Daniel Schwerdtfeger and Weiler & Company, Inc. (hereinafter referred to as "Weiler"), for resale to petitioner's employer in Illinois. The accident involving Ruiz occurred approximately 2½ years later on June 16, 1992, after Omicron had purchased it.

Petitioner first named respondent in a five-count fourth amended complaint in which he alleged that he was a citizen and resident of Illinois when he sustained injury while working with or near food processing equipment, including a certain screw conveyor machine model no. CSC1412-6, Serial No. 83310, designed, manufactured, distributed and sold by Custom Stainless sometime in 1983 (R67). Petitioner further alleged that Custom Stainless, incorporated in California with its principal place of business in California, dissolved sometime in 1986 and that respondent became a successor corporation under the laws of the State of California when it entered into an agreement for the purchase of certain assets of Custom

Stainless (R67). Petitioner further alleged that other defendants, Weiler East and Weiler, and its alleged agent and employee, Schwerdtfeger, thereafter arranged for the sale and delivery of the equipment to petitioner's employer, Omicron, in Schiller Park, Illinois, on or about October 31, 1989 (R67). Counts I through IV sought damages against the defendants on theories of products liability, ordinary negligence, breach of implied warranty, and breach of implied warranty of fitness for a particular purpose, whereas count V against only Weiler, Weiler East and Schwerdtfeger sought damages for professional negligence.

Weiler and Weiler East filed cross-claims seeking contribution and apportionment from Custom Stainless and Blentech as corporate successor (R99, 136).

Blentech filed a motion for summary judgment against petitioner on counts I through IV of the fourth amended complaint and for dismissal of the cross-claims on the basis that Blentech was not a corporate successor to Custom Stainless (R125). Blentech supported its motion with a Rule 12(m) statement of material facts (R126) including the affidavit of Darrell Horn, Blentech's president, and the agreement between Blentech and Custom Stainless dated July 1, 1986 (R127).

The district court thereafter rendered a memorandum opinion and order granting Blentech summary judgment, reported at 860 F. Supp. 602 (R211, 212, 213). The district court applied the "most significant contacts" test in determining that Illinois law applied where petitioner was an Illinois domiciliary who was injured in Illinois. It next found that Blentech could not be liable as a mere purchaser of the assets of Custom Stainless nor could it be

liable for its debts and liabilities. It found that there was neither an express nor an implied agreement of assumption, the transaction was neither a consolidation nor a merger between purchaser and seller, and that Blentech as purchaser was not merely a continuation of Custom Stainless as seller.[1]

Undeterred, petitioner appealed to the Seventh Circuit which affirmed the judgment of the district court. Although it disagreed with the district court's choice of applying Illinois law, it concluded that Blentech was also entitled to judgment under California law. After reviewing the "products line" exception as it has been treated across the country in a number of states, including California, the Seventh Circuit concluded that petitioner could not maintain his case against Blentech based upon its reading of California corporate law.

## B. CORRECTION OF MISSTATEMENTS IN PETITION AND PROCEEDINGS BELOW

The petition and the opinion of the Court of Appeals do not completely and correctly set forth the facts of the case. Indeed, the petition is remarkable for failing to include any of the relevant testimony.

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[1] Petitioner thereafter obtained a default judgment for $8,000,000 against Custom Stainless (R232). Petitioner settled with his employer for $100,000 and waiver of the existing workers' compensation lien of $464,850.89 (R234). Petitioner settled with Weiler for $1,700,000 (R218) and with Weiler East for $1,500,000 which covered Schwerdtfeger's potential liability as well (R224).

Petitioner in his List of Parties section states that the assets of Custom Stainless were purchased by Blentech (petition, at ii). This is not true as Blentech did not purchase every asset. Continuing with this misstatement, the opinion also states that Blentech followed in the footsteps of Custom Stainless "by purchasing its principal assets and continuing its business." Although petitioner made this argument in the Seventh Circuit, again, it is simply not true. Blentech never continued the business of Custom Stainless and the district court so held. The opinion also states that Blentech continued to manufacture product lines of Custom Stainless, using the same product designs, the same factory, the same management and the same employees. Again, this was petitioner's argument before the Seventh Circuit, but is not borne out by the record.

Pursuant to Rule 15.2, lest it appear that Blentech would otherwise waive consideration of the record based upon what the Court of Appeals viewed as having occurred in the proceedings below, it sets forth at some length the testimony which fully supported the district court's entry of judgment in its favor under Illinois or California law.

According to the affidavit of Darrell Horn, president of Blentech, it did not purchase or receive accounts receivable from Custom Stainless nor assume its debts; Blentech did not purchase good will; no Blentech shares were exchanged for the purchase of assets of Custom Stainless; no members of the board or officers of Custom Stainless became members of the board of directors or officers of Blentech; and Blentech did not use the business name of Custom Stainless on any of its product line names (R127).

According to the agreement of purchase and sale of assets executed between Jesse L. Tapscott on behalf of Custom Stainless and Darrell Horn on behalf of Blentech, Blentech agreed to purchase certain fixed assets, equipment, supplies and other personal property as scheduled in addition to inventory secured by promissory notes; Blentech was not to assume any liabilities (R127). Specifically, the agreement provided in relevant part:

> (c) *Product Liability Claims of [Custom Stainless'] Business.* Tapscott shall indemnify and hold Blentech and the property of Blentech and its business free and harmless from any and all claims, losses, damages, injuries and liabilities, including reasonable attorneys' fees relating to or arising out of the following claims against [Custom Stainless] . . . . With respect to any other product liability claims relating to products manufactured by [Custom Stainless] before the purchase of the Assets by Blentech pursuant to the Purchase Agreement, Tapscott shall indemnify and hold Blentech and the property of Blentech and its business free and harmless from any and all claims, losses, damages, injuries and liabilities, including reasonable attorneys' fees . . . .

(Emphasis in the original) (R127). The agreement further provided that with respect to insurance:

> Tapscott shall cause [Custom Stainless] to pay, or cause [Custom Stainless] to segregate the funds to pay, up to fifty percent (50%) of the cost of insurance obtained by Blentech for a period of three years following the Closing Date [July 1, 1986] under the Purchase Agreement, up

> to a maximum of $50,000 covering products liability claims on products manufactured by [Custom Stainless] prior to the Closing Date. All decisions regarding such insurance including without limitation coverage limits, deductibles and whether insurance will be obtained at all shall be the sole decision of Blentech.

(R127). The agreement set forth that it was to be construed in accordance with the laws of the State of California (R127).

Darrell Horn testified in his discovery deposition that he first became aware of Tapscott's desire to sell after Horn had contacted a number of business brokers (13).[2] It was his understanding that Tapscott wanted to leave the business of designing and manufacturing food processing equipment because he could no longer obtain product liability insurance (15). Most of his negotiations with Tapscott concerned price, tax effect and liabilities (20). When it came to retaining personnel, he asked Tapscott his opinion, but he also had discussions with two engineers from another company who were not ultimately hired (24). The purchase agreement was for approximately $530,000 and the obligation to pay Tapscott was secured by an interest in a schedule of certain assets described in the agreement (84-5).

Horn testified that he did not want to be saddled with product liability lawsuits (36-7). The set aside provision was to offset his insurance which cost substantially

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[2] Because complete deposition transcripts can be found only as an attachment in the record (R142), all citations shall be to the page of the deposition transcript in which the testimony appears.

more than $50,000 annually (70-1). The insurance was for Blentech's protection in case it was sued for a Custom Stainless product (83).

The provision was introduced late into the negotiations and was one of the last hurdles in the month leading up to the agreement (38). Some of the trust money was used to reimburse Blentech for insurance premiums while the rest was used to reimburse it for costs associated with a pending case in Iowa involving a Custom Stainless product (72-3). There was no question but it was understood that Blentech was going to try to get product liability insurance, which it did in 1987 (40-1). It was Horn's understanding that this policy protected Blentech for only its products (40-1).

Horn's business plan was to "stay as far as [he] could away from things that everybody else built and develop machinery" that was unique as possible because California was a very expensive place to manufacture (32-3). Horn chose the name Blentech because he wanted a name "that had a sense of technology" and he was interested in the wine industry and food industry (17-18). He never considered the use of any name that was similar to Custom Stainless (18). It was his feeling when he purchased the assets of Custom Stainless that he was starting the "business from scratch" (62). One of the major asset acquisitions of the transaction was Tapscott's rights to the Versa-Therm patent (66-7). Blentech now owns the patent on the Versa-Therm and Jesse Tapscott is not listed as inventor (73-4). Blentech's patent on Versa-Therm was due to certain improvements that were subsequently made (74-5).

He further testified that when Blentech started, it used a different telephone number than Custom Stainless, he had to sign a new lease for the physical plant (which was not owned by Custom Stainless) in Blentech's name, Blentech used a different mailing address and he advised people who called that Blentech had no connection whatsoever with Custom Stainless (101-3). Blentech never manufactured any parts for Custom Stainless machines (103-4).

Aside from Johnston Equipment which contacted him shortly after he started Blentech, Horn was unaware of any other relationship between an outside sales representative and Custom Stainless (47-8). He never did business with Weiler East (48). He did not know Dan Schwerdtfeger (101).

At the time of his discovery deposition, Jesse Tapscott was 61-years old and retired since he dissolved Custom Stainless in 1986 (13-14). Previously, he was production manager at Reitz Manufacturing which he left in 1975 (36-7). Custom Stainless was incorporated in approximately October or November 1977 (35-6). Its business was the manufacture of food processing equipment, including blenders, cookers, conveyors, hoppers and assorted custom stainless steel fabrications (41-2). Its major business was blending and cooking, with screw conveyors comprising only 1-5% (42). Custom Stainless operated through outside sales representatives and also directly with buyers through advertisements and exhibitions at trade shows (45-6). It had "lots" of competition (50).

He decided to go out of business when his product liability insurance policy expired in May 1986 and he was

unable to find new insurance (56). A broker eventually put him in touch with Darrell Horn, among two or three other people interested in the company (57-8). He did not know Horn before he decided to get out of the business (60).

He sent a letter to his "bigger" customers and informed them that Custom Stainless was in the process of going out of business and that he hoped it did not inconvenience their future plans (69-70). The letter did not mention Horn or respondent's business (70-71). He testified that if a business customer needed a part for Custom Stainless equipment, Custom Stainless kept in stock only "typically off-the-shelf kind of things like bearings and seals" (72). Customers could purchase parts from local suppliers (72-3). Custom Stainless also rarely performed repair work because most customers had their own maintenance people (73).

He let his sales manager go before he went out of business (68). Letters were not sent to sales representatives because they would have been in daily telephone contact with Custom Stainless and known he was going out of business (74). He would have told sales representatives that he was selling certain assets to Blentech only "at the last minute" (75). He did not tell them that if they needed food processing equipment, they could deal with Blentech (76). It was his understanding that Horn was going to be in some kind of fabrication, but it was not clear to him if it involved food processing equipment (67). There was no discussion about Horn receiving any customer lists and he did not give Horn any customer list (67).

When he sold the assets, the lease of Custom Stainless was terminated and renegotiated by Blentech (91). The inventory was primarily raw stainless steel sheets, plates, bars and pipe (92). There were no finished goods or semi-finished goods or work in progress included in the inventory (92). At the time of sale, Custom Stainless had no existing service contracts (207-8). He assumed that property and general liability insurance were terminated (94). The $50,000 that he set aside in trust was all that he felt he could afford (131).

At the time of the sale, his three children worked for Custom Stainless, one daughter acting as buyer while a second did payroll and accounts, and a son worked in the shop putting together electrical control and hydraulic controls (97-8). None of them had job titles (98). After the sale, two of his three children continued to work at Blentech, but a third left within a short time (98-9). His wife never worked for Blentech (100). Other than explaining the machinery to Horn for a short time after the sale, he did not provide any consultant services (119-20). He has no continuing relationship with Horn (203).

The purchase was secured by three promissory notes, one for $100,000, a second note for $75,000 and a third note for $40,000 for the purchase of the Versa-Therm patent (107-8). The security agreement terminated due to the fact that he had been fully and completely paid as a secured party (113-14). Horn was "very punctual" in paying him (108-9) according to the terms of all of the agreements (123).

He did not assist Blentech in the sale of Versa-Therm products after Blentech started business (116-17). Versa-Therm was the only product to which he held a patent

(117-18). Custom Stainless had only built one or two "demonstrator units" before he went out of business, neither of which had been sold (118).

He was also asked the following questions and gave the following answers:

Q: Now, in regards to sales representatives such as Weiler East, you told us you had conversations with those people on the phone and you told them that you were going out of business, correct?

A: Yes.

Q: Did you ever tell them that Blentech was going to be Custom Stainless, was going to take over everything for you and run everything like it used to be?

A: No, no.

Q: In fact, you told them you were going out of business?

A: That's all.

Q: And you already made up your mind before you even met Mr. Horn that you wanted to get out of that business?

A: Yes (228).

* * *

Q: So if you hadn't have sold this business to Mr. Horn, or someone hadn't come and bought the hundred percent of the physical inventory, you would have sold it to someone else, right?

A: Yes.

Q: And if someone else wouldn't buy a hundred percent of all your nuts, bolts, physical inventory, you would have sold it off piecemeal, also; isn't that correct?

A: Yes (229).

* * *

Q: On page 2, 1.2, subsection B, . . . it says, 'Buyer shall not assume any liabilities of CSE'; is that correct?

* * *

A: Yes, that's what it says (230).

* * *

Q: . . . [W]ere there any other parties to this agreement other than Blentech and Custom Stainless Equipment?

A: No (231).

* * *

Q: So the only parties to this agreement were the two named buyer and seller, correct?

A: Yes (232).

* * *

Q: At page 4 of that agreement, at the bottom of the page, we'd spoken earlier about the maximum $50,000 that you were to put into a trust account?

A: Yes.

Q: And that was to purchase indemnity insurance for Blentech for a period of three years following the date of closing; is that correct?

A: That's what it says (233).

* * *

Q: Now, you told us that you started this company – I think counsel asked you – October or November of '77, it was incorporated, and then dissolved in 1986, correct?

A: Yes.

Q: And for all that time you were known as Custom Stainless Equipment?

A: Yes.

Q: Any other corporate name?

A: No.

Q: Since dissolving that corporation, have you used that name in any way?

A: No.

Q: *As part of your discussions with Mr. Horn, did you make it clear to him that you wanted to get out of this business?*

A: *Yes.*

Q: *Did he make it clear to you that he wanted to start up a whole new company?*

A: *I think so.*

Q: *Okay. And did he in fact choose a new name?*

A: *Yes.*

Q: *Had you ever used the name Blentech?*

A: *No.*

Q: Did Blentech use Custom Stainless's phone number?

A: I don't think so. I think we had it disconnected (235-6).

* * *

Q: And any corporate taxes for the sale of this property, were those paid for by Custom Stainless?

A: I'm sure, yes.

Q: Did Blentech pay any of those?

A: No.

Q: Any unemployment taxes for the unemployed employees that were laid off, were any of those paid for by Blentech?

A: No.

Q: Any worker's compensation claims by any of employees of Custom Stainless, were any of those paid for by Blentech?

A: No.

Q: Any personal taxes or property taxes for Custom Stainless, were any of those paid for by Blentech?

A: No.

Q: Any utilities that you still owed, the power companies or the telephone companies, were those all paid for by Custom Stainless?

A: Yes.

Q: Did you ever give any of those debts over to Blentech and ask them to pay them?

A: No.

Q: The rent that you owed on that property, on the plant, did you have Custom Stainless pay those debts?

A: We terminated the lease (236-7).

* * *

Q: In fact, did you turn over any debts of this company, of Custom Stainless Equipment, to Blentech to be paid?

A: No.

* * *

Q: Okay. *Did you sell the good will of Custom Stainless as part of this agreement?*

A: *No, I only sold the assets.*

Q: Okay. *Did you sell any customer list as part of this agreement?*

A: No.

Q: Did you sell any trade names as part of this agreement?

A: Yes, I – if you consider the Versa-Therm.

Q: Besides for the patented Versa-Therm. I'm talking about any other trade names that Custom Stainless may have had?

A: No.

Q: And Versa-Therm was a personal asset . . . of yours as opposed to Custom Stainless's?

A: Yes (239).

* * *

Q: Okay. In the sale of Custom Stainless Equipment's assets, *did you obtain or receive any stock in Blentech?*

A: *No.*

Q: *The sole stockholders of Custom Stainless Equipment were you and your wife at the time of sale?*

A: *And my kids.*

Q: *Did any of those people become shareholders of Blentech?*

A: *No.*

Q: *And all the assets that you received from this sale, all the money you received from the sale, those all went to Custom Stainless's shareholders; is that correct?*

A: *Yes.*

Q: *Was there any exchange of stock between the two companies in this sale?*

A: *No.*

Q: The officers of Custom Stainless Equipment, who were the officers at the time of sale, just you and your wife?

A: Yes.

Q: Did any officers of Custom Stainless Equipment become officers of Blentech?

A: No (239-40).

* * *

Q: *Did anyone from Custom Stainless Equipment Company become managers of Blentech, either*

> *you, your wife, or any member of your company become managers . . . . We're talking about control group type people as opposed to somebody who takes orders. Someone who runs day-to-day operations. I'm talking about somebody who runs the whole shop.*
>
> A: *No* (240-41).

(Emphasis added). His consulting agreement and covenant not to compete set forth that he had no power or authority as agent to act for, bind or otherwise create or assume any of Blentech's obligations (234).

John M. Lennox, III, testified in his deposition that he began with Custom Stainless in 1980 and that at the time it went out of business he was not in charge of either engineering or manufacturing (11-12). Tapscott was his boss (16). He was not involved in developing any customer lists (87). When Custom Stainless went out of business, he had to apply for employment with Blentech (9). Tapscott did not work there when Blentech started business (35). His own duties changed so that he became more involved in management and quality control (37, 60). Custom Stainless did not manufacture any equipment similar to a blender cooker or tumbler system which Blentech manufactured (52, 125). Blentech also had not built "for a long time" a single agitator blender that Custom Stainless manufactured (55). With respect to screw conveyors, "they all have screws, and they all have troughs, and they all load at one end and discharge at the other" (59). Only workmanship or job specifications distinguished them (59-60).

## REASONS FOR DENYING THE WRIT

### I. THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S ARGUMENTS UNDER RULE 10.

Petitioner has purported to frame the question presented as whether the principle of depecage, as applied through the federal system, requires the relevant issue to be decided consistently with the law of the state which has been recognized to have the greatest interest. According to petitioner, the Seventh Circuit failed "to apply a *state's* law to an issue in the way that that state would itself have done" (Emphasis added) (petition, at 17). Even if this were true, *arguendo*, petitioner presents no question that occasions the further exercise of judicial discretion under Supreme Court Rule 10.

Petitioner lost in the district court based upon its application of Illinois tort law as the situs of his injury. Petitioner lost in the Court of Appeals based upon that Court's application of California law. Petitioner filed no petition for rehearing, although he postures that the choice-of-law issue is of such far-reaching importance that the opinion of the Seventh Circuit threatens to overturn a procedural doctrine never before questioned.

Petitioner has not identified any conflict with precedent of this Court or with another decision from a court of appeals on the same issue. Indeed, this petition appears to be an invitation for this Court to decide what the law of California is, and whether the Seventh Circuit followed it. Without intending to do so, petitioner has demonstrated precisely why this Court should decline the invitation to exercise jurisdiction over what was and

is a question of state law that has found its way into the district court only by reason of diversity jurisdiction.

The closest that petitioner comes to citing any case law is in a footnote where he provides a string of citations from other decisions of the courts of appeals (at 14). Petitioner does not demonstrate further how the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings or so sanctioned such a departure as to call for an exercise of this Court's supervisory power. Rule 10 requires that any such departure be clear and compelling. Petitioner's mere assertion of such a conflict surely cannot suffice. Petitioner wanted the Court of Appeals to apply California rather than Illinois law. Now that it has done so, petitioner simply complains that it should have applied California law differently. The petition provides neither a federal question nor an occasion for the exercise of this Court's supervisory authority over federal courts.

The Supreme Court of the United States is the final arbiter of all federal questions. The petition raises no federal question, only whether a court of appeals properly applied state law. The Supreme Court is manifestly not a national exponent of state law. It is not the final arbiter of state law. It is not a super tribunal which decides whether a court of appeals has decided a matter of state law in accordance with how it believes a state court of last resort would decide it. Petitioner's complaint is simply that the Seventh Circuit has misapplied a rule of state law. Whether the Seventh Circuit misapplied California law is not an issue that merits review by writ. Petitioner's argument that it is proves too much.

## II. IN ANY EVENT, UNDER CALIFORNIA LAW, BLENTECH WAS NOT LIABLE AS CORPORATE SUCCESSOR TO CUSTOM STAINLESS FOR A PRODUCT WHICH CUSTOM STAINLESS DESIGNED, MANUFACTURED AND SOLD THREE YEARS BEFORE CUSTOM STAINLESS DISSOLVED.

Assuming that the Court does wish to consider the merits of the petition, respondent will demonstrate below that the Court of Appeals properly affirmed the judgment of the district court based upon its application of California law. As petitioner failed to make out a case for successor tort liability even under the "product line" approach adopted in *Ray v. Alad Corp.*, 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977), there is no reason for this Court to issue a writ.

In *Ray*, the predecessor corporation was "Alad I" and the new corporation's name was "Alad II". Alad II purchased not only Alad I's trade name but its goodwill. After forming the new corporation, Alad II manufactured the same specialty line of ladders under the prior name. Alad I was known through the industry as the "top quality manufacturer" and Alad II produced the same components and solicited the same customers without informing them of a change in the ownership through the same sales representatives. 560 P.2d at 5.

In creating a "product line" exception, the California Supreme Court recognized three factors in order to justify the extension of liability: (1) the lack of an adequate remedy by petitioner against the seller; (2) the buyer's access to knowledge of product risks; and (3) the transfer of goodwill associated with the seller's product line.

In *Kramer v.Weedhopper of Utah, Inc.*, 204 Ill. App. 3d 469, 477, 562 N.E.2d 271 (1990), the Appellate Court noted that *all three of these factors must be satisfied* before the "product line" theory of successor liability will be imposed (*citing Lundell v. Sidney Machine Tool Co.*, 190 Cal. App. 3d 1546, 1556, 236 Cal.Rptr. 70, 77 (1987); *see also, Stewart v. Telex Comm., Inc.*, 1 Cal. App. 4th 190, 197, 1 Cal.Rptr. 2d 669, 672-73 (1991).

Of the many differences between *Ray* and the present case, the most important is that the purchase agreement in this case was for certain assets which did *not* include goodwill. Tapscott specifically testified that goodwill was not part of the agreement. Nor did respondent buy Tapscott's customer list. As there was no sale of goodwill as part of the agreement, petitioner could never satisfy all three steps of the *Ray* analysis. *Kramer v. Weedhopper of Utah, Inc.*, 204 Ill. App. 3d at 477.

Other differences between the present case and *Ray* also outweigh any similarities. Tapscott had written letters to his bigger customers advising them that Custom Stainless was ceasing business and did not mention Horn or respondent. While Blentech may have conducted business operations from the same location, it obtained a new telephone number, a new mailing address and a new lease in its own name. Horn also advised people who contacted Blentech at its new number that it had no connection with Custom Stainless and that Blentech did not manufacture parts for Custom Stainless products. Blentech did not retain the trade name of Custom Stainless and never considered using its name or a similar name. Aside from Johnston Equipment, Blentech did not have an outside sales representative which had also acted in the same capacity for Custom Stainless. Blentech

employed other sales representatives than Weiler East which had represented Custom Stainless. It attended trade shows and exhibitions without Tapscott.

Further unlike *Ray*, the screw conveyor was a generic product which comprised only between 1% and 5% of the business of Custom Stainless. Horn testified that when Blentech manufactured these conveyors, they were not sold separately but typically as part of a larger system and even then under Blentech's name which bears no similarity to that of Custom Stainless. Both Horn and Tapscott believed that Blentech was starting from "scratch" and as a "whole new company." Some products like the patented Versa-Therm line were added, whereas others like the single agitator blender were discontinued.

Initially, this case may have appeared to present a "true" conflict of law issue because Illinois has repeatedly and emphatically rejected the "product line" exception to non-liability recognized in California. However, even under California law as it has developed, petitioner could never satisfy *Ray* where Blentech did not buy and Custom Stainless did not sell its goodwill or customer list. Blentech employed different outside sales representatives, the businesses were not identical in all product lines, and the screw conveyor in this case was a generic product comprising only a small fraction of the total Custom Stainless business.

## III. IN THE FURTHER ALTERNATIVE, THE DISTRICT COURT PROPERLY DETERMINED THAT BLENTECH WAS NOT LIABLE AS A SUCCESSOR CORPORATION TO CUSTOM STAINLESS UNDER ILLINOIS LAW.

Because a judgment may be affirmed on any ground appearing of record, alternatively, respondent submits that this Court may also deny the writ on the basis that summary judgment was properly granted by the district court applying Illinois rather than California law.

Generally, a corporation that purchases assets of another corporation is not liable for the latter's debts and liabilities in the absence of an agreement providing otherwise. *Hernandez v. Johnson Press Corp.*, 70 Ill. App. 3d 664, 666-67, 388 N.E.2d 778 (1979); *Johnson v. Marshall & Huschart Machinery Co.*, 66 Ill. App. 3d 766, 384 N.E.2d 141 (1978). The district court properly set forth and found inapplicable the four exceptions to the general rule of non-liability: (1) where there is an express or implied agreement of assumption; (2) where the transaction amounts to a consolidation where merger of the purchaser or seller corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations. *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 460 N.E.2d 895 (1984). As petitioner never argued the fourth exception (and Weiler East never argued any of the exceptions in the district court), Blentech confines its alternative argument to the first three exceptions set forth below.

### A. BLENTECH DID NOT EXPRESSLY OR IMPLIEDLY ASSUME LIABILITY; ON THE CONTRARY, THE AGREEMENT CONTAINS A DISCLAIMER.

The agreement between Custom Stainless and Blentech was not silent with respect to the assumption of liability for product claims which predated the closing date of the agreement. Tapscott expressly agreed to "indemnify and hold Blentech and the property of Blentech and its business free and harmless from any and all claims, losses, damages, injuries and liabilities . . . relating to or arising out of" various claims against Custom Stainless, including product liability actions relating to products manufactured by Custom Stainless prior to the date of sale. As the district court noted, this explicit language strongly argues against a finding of any assumption of liability on Blentech's part.

Notwithstanding the disclaimer quoted above, petitioner argued in the district court that it could be an express or implied agreement of assumption based upon the following insurance provision:

> Tapscott shall cause [Custom Stainless] to pay, or cause [Custom Stainless] to segregate the funds to pay, up to fifty percent (50%) of the cost of insurance obtained by Blentech for a period of three years following the Closing Date [July 1, 1986] under the Purchase Agreement, up to a maximum of $50,000 covering products liability claims on products manufactured by [Custom Stainless] prior to the Closing Date. All decisions regarding such insurance including without limitation coverage limits, deductibles and whether insurance will be obtained at all shall be the sole decision of Blentech.

(R127). This provision was included for the purpose of providing Blentech with the means to defend lawsuits arising out of pre-agreement sales of Custom Stainless products, not as an assumption of liability for those products. As Tapscott testified, the money set aside represented all that he felt he could afford. As the district court found, the $50,000 which he set aside went to pay the defense of a claim in Iowa in which Blentech obtained summary judgment.

The district court properly relied on *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d at 209-10. In *Green*, under the sales agreement the buyer agreed to include the seller as a named assured for a five-year period after the closing date. The plaintiff argued that this insurance provision was either an expressed or implied assumption on the buyer's part of the predecessor's liability. Rejecting this argument, the Appellate Court drew a distinction between agreeing to include a predecessor corporation as a named insured and agreeing to assume its liabilities. 122 Ill. App. 3d at 210. The Court construed the insurance provision to mean that it was the seller that agreed to provide insurance for products sold up until the closing date and that because the lawn mower had been sold prior to that date, the buyer had not assumed liability. 122 Ill. App. 3d at 210.

Petitioner made no attempt to distinguish *Green*, despite the district court's observation that the present case presented an even stronger indication that the first exception did not apply. Whereas *Green* contained no disclaimer, in the present case Blentech expressly disclaimed any assumption of liability. The insurance provision was inserted for the benefit of Blentech, not Custom Stainless. It did not conflict with Blentech's disclaimer of

liability. All it did was to require Tapscott to pay for a three year period part of the cost of defending claims which arose out of products designed, manufactured or sold by Custom Stainless, but Custom Stainless was not thereby insured. Regardless, Blentech did not agree to assume liability for *this claim* which only arose when petitioner was injured in 1992 or three years *after* this provision expired by its own terms.

## B. THE SALE OF CERTAIN ASSETS BY CUSTOM STAINLESS TO BLENTECH WAS NOT A CONSOLIDATION OR MERGER OF THE SELLER WITH THE PURCHASER CORPORATION.

The second exception to non-liability for a *de facto* merger requires "a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation." *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 211, 460 N.E.2d 895 (1984), *quoting Hernandez v. Johnson Press Corp.*, 70 Ill. App. 3d 664, 667, 388 N.E.2d 778 (1979). Petitioner's argument to the contrary in the district court was virtually non-existent.

There was no payment of the required assets with shares of Blentech stock. The district court properly found no exchange of stock which could bring the transaction under the merger exception. Regardless of whether

there was some continuity of personnel, physical location, assets or general business operations, absent continuity of stock ownership, there was no basis for finding consolidation or merger between Custom Stainless and Blentech, and the district court properly so found. The absence of a continuity of shareholders has been a sufficient basis to defeat a finding of a *de facto* merger. *Nguyen v. Johnson Machine & Press Corp.*, 104 Ill. App. 3d 1141, 1148, 433 N.E.2d 1104 (1982); *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 211.

### C. THE DISTRICT COURT PROPERLY FOUND THAT BLENTECH WAS NOT MERELY A CONTINUATION OF CUSTOM STAINLESS.

For the same reasons, the district court properly found that Blentech was not merely a continuation of Custom Stainless in a new corporate guise (*see Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 210, 460 N.E.2d 895 (1984) (characterizing the "continuation exception" and the "merger exception" as "inseparable").) Again, absent continuity of stock ownership, a finding of continuation is not warranted. *Hernandez v, Johnson Press Corp.*, 70 Ill. App. 3d 664, 667, 388 N.E.2d 778 (1979); *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 210. *Fenderson v. Athey Products Corp.*, 220 Ill. App. 3d 832, 581 N.E.2d 288 (1981), on which petitioner relied, is chiefly distinguishable on this ground among others.

Many Illinois decisions which have addressed this issue have emphatically stated that one who has done nothing to create a risk of injury cannot be burdened with the duty of preventing that injury. The importance of the

requirement that there be a continuity of shareholders has been stressed, for in its absence it would not be "just to require the successor corporation to assume the liabilities of the predecessor when it has already paid a substantial price for the assets of the predecessor." *Nguyen v. Johnson Machine & Press Corp.*, 104 Ill. App. 3d 1141, 1149, 433 N.E.2d 1104 (1982). These decisions have also recognized that any change in the law in this area should come from the legislature. *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 212-13; *Nguyen v. Johnson Machine & Press Corp.*, 104 Ill. App. 3d at 1151.

Relying on well-settled law in this area, the district court properly found that none of the exceptions to non-liability applied in determining that Blentech was not the corporate successor to Custom Stainless.

## CONCLUSION

For all of the foregoing reasons, the petition for *writ of certiorari* should be denied.

Respectfully submitted,

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